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No. 84-1394

In the
Supreme Court of the United States

OCTOBER TERM, 1984

HUGH M. MATCHETT,

Petitioner,

vs.

CHICAGO BAR ASSOCIATION, an Illinois corporation, FIELD ENTERPRISES, INC., a Delaware corporation, and CHICAGO TRIBUNE COMPANY, an Illinois corporation,

Respondents.

BRIEF OF THE CHICAGO BAR ASSOCIATION IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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TABLE OF CONTENTS

	Page
Table Of Authorities	ii
Questions Presented	iv
Statement Of The Case	1
Reasons For Refusing Writ	4
I. The Statement Of The Chicago Bar Association Is Not Actionable As A Matter Of Law	4
II. The Trial Court Properly Denied The Injunctive Relief Sought By The Petitioner	7
III. The Denial Of Matchett's Motion To Amend The Complaint Was Not An Abuse Of Discretion	10
Conclusion	11

TABLE OF AUTHORITIES

	Page
Anagnost v. Chicago Bar Association, (1980) 83 Ill. App. 3d 466, 404 N.E. 2d 326, 329	5
Chapski v. Copley Press, (1982) 92 Ill. 2d 344, 352, 442 N.E. 2d 195, 199	7
Farnsworth v. Tribune Co., (1969) 43 Ill. 2d 286, 289, 253 N.E. 2d 408, 409	5
John v. Tribune Co., (1962) 24 Ill. 2d 437, 442, 181 N.E. 2d 105, 108	7
Kohan v. Rimland School, (1981) 102 Ill. App. 3d 524, 430 N.E. 2d 139, 141	9
Miami Herald Publishing Co. v. Tornillo, (1974) 418 U.S. 241	8
Montgomery Ward & Co. v. United Retail, Wholesale and Department Store Employees, (1948) 400 Ill. 38, 79 N.E. 2d 46, 48	8
Near v. Minnesota ex rel. Olson, (1931) 283 U.S. 697	7
New York Times v. Sullivan, (1964) 376 U.S. 254	5
New York Times v. United States, (1971) 403 U.S. 713	7

	Page
Pickle v. Curns, (1982) 106 Ill. App. 3d 734, 435 N.E. 2d 877, 882	10
Reardon v. Ford Motor Co., (1972) 7 Ill. App. 3d 338, 287 N.E. 2d 519, 525	10
Sokolowski v. Board of Election Commissioners, (1967) 89 Ill. App. 2d 60, 61, 232 N.E. 2d 229	9
Spencer v. Community Hospital of Evanston, (1980) 87 Ill. App. 3d 214, 408 N.E. 2d 981, 987	6
St. Ament v. Thompson, (1968) 390 U.S. 727, 731	5

QUESTIONS PRESENTED

There is no Federal or Constitutional question involved in this petition.

1. The only statement attributable to The Chicago Bar Association is that it issued a press release that Matchett was "not recommended" by the Association in his candidacy for the office of justice of the Appellate Court of Illinois. Matchett himself stated to the defendant-newspapers that the Association had not recommended him because of his age, and that is what the newspapers reported. Such a statement is an expression of opinion, which when considered in context is a question of law to be resolved by the court. No amendment of the plaintiff's complaint could turn the issue into one of fact, nor could it have corrected the pleading defects. It was,

therefore, proper for the trial court to dismiss the complaint.

2. The statement of fact that the petitioner failed to meet The Chicago Bar Association's criterion with respect to age is not libelous and does not support the conclusion that he satisfied all other requirements necessary to a "recommended" endorsement.

3. There is no dispute as to the statement of The Chicago Bar Association. It was a true statement and not defamatory. There were no undisclosed material facts. Nothing could have changed Matchett's age or the term of office. Therefore, the use of discovery would not have enabled the petitioner to amend his complaint to state a cause of action for libel.

4. The petitioner's discovery of the motives of The Chicago Bar Association would not enable him to state a cause of action for libel when the statement complained of is not defamatory.

5. The Chicago Bar Association's statement that the petitioner was "not recommended" is capable of innocent construction and when considered in context is innocent as a matter of law. The innocent construction rule does not require that every reader make the same interpretation.

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STATEMENT OF THE CASE

Reference to additional facts will be of assistance to this Court. The facts set forth herein are contained in Appendix "A" to Matchett's petition in this Court.

At the time of the petitioner's candidacy he was 69 years of age. If elected, Matchett would have been compelled to retire at age 75 and would not have been able to complete the ten-year term. He had voluntarily submitted himself to The Chicago Bar Association (CBA) and its Committee on Evaluation of Candidates for investigation and evaluation as a candidate for judicial office. The Bar Association has a policy of not recommending candidates who are over 65 years of age and seeking judicial office for the first time, unless they exhibit exceptional qualifications. The CBA did not recommend the petitioner and issued an opinion of "not recommended" because of his age and so advised the petitioner.

The petitioner was notified of the CBA's findings on January 13, 1982.

On February 22, 1982 the Bar Association issued a press release, regarding the petitioner and other judicial candidates, which simply stated as to Matchett that he was "not recommended" by the Association. Within two days the Chicago Sun-Times and the Chicago Tribune each reported the finding of the Association, along with Matchett's comment that he had been found not recommended because of his age. Matchett filed his complaint on March 12, 1982, four days before the primary election.

Each of the defendants filed a motion to dismiss the complaint, which the trial court granted. The petitioner then sought to amend his complaint without tendering a proposed amended complaint. The motion to amend was denied because the suggested amendments would

not have cured the defects in the original complaint.

REASONS FOR REFUSING WRIT

I. THE STATEMENT OF THE CHICAGO BAR ASSOCIATION IS NOT ACTIONABLE AS A MATTER OF LAW

The CBA issued a press release stating that Matchett was not recommended. The petitioner was aware of the reason for the Association's finding and, in fact, quoted it to each of the defendant-newspapers which in turn published his statement that he was not recommended because of his age. There were no undisclosed material facts. Nothing could change Matchett's age or the term of office. The statement was neither false nor defamatory. Since the statement was true it is non-actionable as a matter of law. Truth is a defense to a claim for libel.

Farnsworth v. Tribune Co., (1969) 43 Ill. 2d 286, 289, 253 N.E. 2d 408, 409.

Even if the opinion of The Chicago Bar Association had been revealed to be untrue, it would still be non-actionable because it is the subject of a qualified privilege. New York Times v. Sullivan, (1964) 376 U.S. 254. Anagnost v. Chicago Bar Association, (1980) 83 Ill. App. 3d 466, 404 N.E. 2d 326, 329, Petition for Leave to Appeal denied by the Illinois Supreme Court, September 19, 1980, Case No. 53426.

A qualified privilege will be deemed waived and the statement libelous only if the defendant held serious doubts as to the truth of the statement or made it with reckless disregard for the truth or falsity of the statement and thereby demonstrated actual malice. St. Ament v.

Thompson, (1968) 390 U.S. 727, 731. Such conduct is not even alleged. Bare conclusions of law that the press and the public might interpret the words "not recommended" to mean "not qualified" and that "malice is the gist of the action" do not overcome the burden of the plaintiff to support his conclusions with sufficient factual allegations. Spencer v. Community Hospital of Evanston, (1980) 87 Ill. App. 3d 214, 408 N.E. 2d 981, 987.

Even if the statement of the CBA were not privileged it is capable of an innocent construction and will not support an action for libel. An article is to be considered as a whole and read in its context, with words and the implications therefrom given their natural meaning. If the statements may reasonably be innocently interpreted they must be declared

non-actionable as a matter of law. John v. Tribune Co., (1962) 24 Ill. 2d 437, 442, 181 N.E. 2d 105, 108. Chapski v. Copley Press, (1982) 92 Ill. 2d 344, 352, 442 N.E. 2d 195, 199.

II. THE TRIAL COURT PROPERLY DENIED THE INJUNCTIVE RELIEF SOUGHT BY THE PETITIONER

The petitioner sought, among other things, a declaratory judgment that he is, apart from age, qualified to be an appellate court judge, that the CBA be required to issue an apology and retraction to be published in the defendant-newspapers and that the defendants be restrained from any further conduct of the kind complained of. Prior restraints are to be presumed unconstitutional. Only a clear and present danger may restrain such publication. Near v. Minnesota ex rel. Olson, (1931) 283 U.S. 697; New York Times v. United

States, (1971) 403 U.S. 713.

Had the trial court granted the relief Matchett requested, it would have, in effect, substituted its judgment on the petitioner's candidacy in place of the CBA and compelled it to publish an opinion which was not that of the Association. The Constitutional guarantee of a free press prohibits judicial or legislative action requiring the publication of an opinion contrary to that held by the declarant. Miami Herald Publishing Co. v. Tornillo, (1974) 418 U.S. 241.

The Constitutional guarantees of free speech and free press are so strong and so well-established that unless a plaintiff can bring himself within a very limited number of exceptions, courts will not enjoin even the publication of a libel. Montgomery Ward & Co. v. United Retail,

Wholesale and Department Store Employees, (1948) 400 Ill. 38, 79 N.E. 2d 46, 48. Matchett did not allege any facts to bring himself within any exception to this well-settled principle.

Matchett waited until the eve of the election before filing his suit for an injunction. At this time the election is long past and the appeal is moot. Sokolowski v. Board of Election Commissioners, (1967) 89 Ill. App. 2d 60, 61, 232 N.E. 2d 229. The Illinois public interest exception to the mootness doctrine does not apply to this private dispute. Kohan v. Rimland School, (1981) 102 Ill. App. 3d 524, 430 N.E. 2d 139, 141.

III. THE DENIAL OF PETITIONER'S MOTION TO AMEND THE COMPLAINT WAS NOT AN ABUSE OF DISCRETION

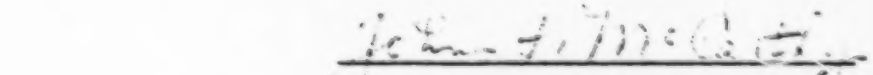
After the trial court entered the order dismissing the complaint with respect to all defendants, the plaintiff sought to amend his complaint. The trial court's denial of the motion was not an abuse of discretion because no tender of a proposed amended complaint accompanied the motion, and the petitioner's suggested amendments could not have cured the defects in the original pleading. Reardon v. Ford Motor Co., (1972) 7 Ill. App. 3d 338, 287 N.E. 2d 519, 525.

Additionally, it would have been improper for the trial court to have permitted an amendment after final judgment, except as required to conform the pleadings to the proof. Pickle v. Curns, (1982) 106 Ill. App. 3d 734, 435 N.E. 2d 877, 882.

CONCLUSION

Matchett's Petition for a Writ of Certiorari is not well founded and should be denied.

Respectfully submitted,



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